UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION ONE

BIMBO FOODS BAKERIES DISTRIBUTION, LLC,	
Respondent,	
and	**Case No. 01-RC-193669**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 633,	
Union.	

OPPOSITION OF BIMBO FOODS BAKERIES DISTRIBUTION, LLC TO THE UNION'S REQUEST FOR REVIEW

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I. Introduction

This matter arises out of a petition filed by the International Brotherhood of Teamsters Local 633 (the "Union") seeking to represent 48 independent contractor distributors, known as "Independent Operators" ("IOs"), who own distribution rights to purchase and sell certain products from Bimbo Foods Bakeries Distribution, LLC ("BFBD" or the "Company").

After considering evidence presented over a three-day hearing, including testimony of five witnesses and submission of nearly 30 exhibits, together with extensive post-hearing briefing, the Regional Director for Region 1 issued a 23-page decision confirming that the 48 IOs are independent contractors, not employees, and dismissed the petition. Using the multi-factor balancing test set forth in *FedEx Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014), the Regional Director found that seven of the 11 relevant factors weighed in favor of independent contractor status, and concluded as follows:

> Weighing all the incidents of the distributors' relationship with Bimbo Foods, I find that Bimbo Foods has carried its burden of establishing that the distributors are independent contractors. Thus, distributors exercise significant control over the details of their work. They are engaged in an occupation that is distinct from Bimbo Foods because they do not do business in the name of Bimbo Foods. They perform their work without substantial supervision by Bimbo Foods. They are compensated based on the success or failure of their efforts and based on the value of their routes, rather than by the hour. They refer to themselves as independent operators or contractors. They render services as part of independent businesses, in that they buy and sell their routes, hire employees, and enjoy the opportunity for entrepreneurial gain and run the risk of entrepreneurial loss.

See Bimbo Foods Bakeries Distribution, LLC, Case No. 01-RC-193669, Decision and Order at 22 (March 31, 2017).[1] The Regional Director's ruling was the latest in a line of Board decisions reaffirming the independent contractor relationship between distributors and suppliers in the food industry. *See, e.g., West Virginia Baking Co., Inc.*, 299 NLRB 306 (1990); *Bellacicco & Sons,*

[1] Citations to the Decision and Order appear hereinafter as "Decision at __."

Inc., 249 NLRB 877 (1980); *Gold Medal Baking Co., Inc.*, 199 NLRB 895 (1972). It also follows former Region 1 Regional Director Kreisberg's 2015 decision in *Pepperidge Farm*, wherein the same Union made the same arguments regarding Pepperidge's independent contractor sales development associates, and lost. *See Pepperidge Farm, Inc.*, Decision and Order, Case No. 01-RC-155159 (Aug. 20, 2015).[2]

Having failed in its first attempt to fundamentally alter the long-standing business relationship between the IOs and BFBD, the Union now requests that the Board give it another shot at doing so. But while the Request for Review ("RFR") asserts that the Regional Director "departed" from Board precedent and made "clearly erroneous" findings on "substantial factual issues," as it must in order to meet the Board's stringent standard for granting review under Section 102.67(c), in reality the RFR is little more than a request that the Board reweigh the hearing evidence on its own and it repeats the same arguments made in the Union's post-hearing brief.

Contrary to the Union's claim, the Regional Director carefully acknowledged the Union's facts and arguments, fully considered them when addressing the multi-factor independent contractor test, and dutifully applied *FedEx* and related Board precedent in holding that a majority of the factors favored independent contractor status. Far from "departing" from any Board precedent, much less raising "a substantial question of law or policy" under Section 102.67(c)(1), the Regional Director faithfully adhered to it. Instead, it is the Union that suggests a full departure from the Board's governing independent contractor test. Knowing that relevant Board precedent is no help here, the Union attempts to grasp onto the Board's joint employer decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015),

[2] As of the date of filing, the Union's Request for Review in *Pepperidge Farm* remains pending.

and argues that *Browning-Ferris* requires analysis of BFBD's "potential" (and not just actual) control over the IOs' "work." Even if *Browning-Ferris* is applicable (which it clearly is not), insofar as the Union argues that *Browning-Ferris* requires analysis of BFBD's "potential" and (not just actual) control over the details of the IOs' business operations, the Regional Director expressly conducted that analysis in the Decision. Moreover, even if the Union were right about using the *Browning-Ferris* test (which it is not), and even if a review under that test would change the analysis with respect to whether BFBD exercises sufficient control over IOs (which it would not), the Regional Director still found six other factors weighing in favor of independent contractor status.

Far from making any "clearly erroneous" findings on a "substantial factual issue," much less one that "prejudicially affected" the rights of the Union under Section 102.67(c)(2), the Regional Director's factual findings under each of the *FedEx* factors cited in support of his independent contractor determination are fully substantiated by the record. There is a total absence of any "compelling" grounds for review under Section 102.67(c), and as a result, the request for review must be denied.

II. Legal Standards

A. NLRB Request for Review Standard

Section 102.67(c) of the Board's Rules and Regulations provides that "the Board will grant a request for review only when *compelling reasons* exist therefor." *See* NLRB Rules and Regulations, 29 C.F.R. § 102.67(c) (emphasis added). Specifically, the Board must deny the Union's RFR unless it establishes one or both the following grounds:

1. That a substantial question of law or policy is raised because [of]… (ii) a departure *from,* officially reported Board precedent.

2. That the Regional Director's decision on a *substantial factual issue* is *clearly erroneous* on the record and such error *prejudicially affects* the rights of a party.

Id. at Section 102.67(c) (emphases added). The United States Supreme Court has explained that under a "clearly erroneous" standard, "[i]f the [fact finder's] account of the evidence is *plausible* in light of the record viewed in its entirety, the [reviewing body] may not reverse it even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (emphasis added). This case checks none of the boxes that would warrant a grant of review. Indeed, it is nothing more than a typical independent contractor case, decided in a typical manner. There is no departure from precedent and there certainly were no clearly erroneous factual determinations that prejudiced the Union.

B. The NLRB's Multi-Factor Independent Contractor Test

Section 2(3) of the NLRA excludes from the definition of "employee" an individual having the status of an independent contractor. 29 U.S.C. § 152(3). As reflected in *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), and *Argix Direct, Inc.*, 343 NLRB 1017 (2004), reaffirmed and refined in *FedEx Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014) *enf. denied*, *FedEx Home Delivery v. NLRB (FedEx II)*, No. 14-1196, 2017 WL 836596, at *1 (D.C. Cir. Sept. 27, 2017), and correctly applied by Region 1 in *Pepperidge Farm*, the Board relies on the common law test of agency to determine if an individual is an independent contractor or employee. *See also Porter Drywall, Inc.*, 362 NLRB No. 6 (Jan. 29, 2015). The Board has outlined 11 specific factors to consider in these cases. *FedEx*, 361 NLRB No. 55, slip op. 2-3 (citing the relevant factors). Those factors include:

1. the extent of control by the "employer";
2. whether the individual is engaged in a distinct occupation or business;

3. whether the work is performed under the "employer's" direction or supervision;
4. the skill required in the particular occupation;
5. whether the "employer" or individual supplies the tools and instrumentalities for the work;
6. the length of time of the relationship;
7. the method of payment;
8. whether the work is part of the contractor or employee relationship;
9. whether the parties believe they have an independent contractor or employee relationship;
10. whether the principal is or is not in the business; and
11. whether the individual is rendering services as part of an independent business, including whether the putative independent contractor has "entrepreneurial opportunity for gain or loss."[3]

Id. Additionally, when reviewing the factual record, the Board explained that the following principles must be applied:

a. all factors must be assessed and weighed;
b. no one factor is decisive;
c. other relevant factors may be considered, depending on the circumstances; and
d. the weight to be given a particular factor or group of factors depends on the factual circumstances of each case.

With respect to the last principle, a factor "may be entitled to unequal weight [] because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other." *FedEx*, 361 NLRB No. 55, slip op. 18, n. 86. The Board has recognized that this

[3] In *FedEx Home Delivery v. NLRB* (*FedEx I*), 563 F.3d 492 (D.C. Cir. 2009), the D.C. Circuit refused to enforce a Board order finding FedEx drivers to be employees, finding instead they were independent contractors and relying in part on their entrepreneurial opportunity for gain or loss, which the D.C. Circuit called an "animating principle" in the analysis. *Id.* at 497. In the Board's 2014 *FedEx* decision, where it again found FedEx drivers to be employees, it rejected the D.C. Circuit's treatment of entrepreneurial opportunity as an "animating principle," instead holding that it is "part of a broader factor that . . . asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." 361 NLRB No. 55 at 10. Last month, the D.C. Circuit again refused to enforce the Board's decision, holding that the FedEx drivers were independent contractors. *See FedEx II*, No. 14-1196, 2017 WL 836596, at *1. BFBD believes the D.C. Circuit's analysis of entrepreneurial opportunity is the correct one, but it understands the Region is bound to follow Board law. Under either formulation, however, the IOs in this case — who have substantially more entrepreneurial opportunity than the FedEx drivers — are independent contractors.

multi-factor balancing test is "quite fact-intensive." *Argix,* 343 NLRB at 1020. By its very nature, therefore, this test requires a substantial exercise of discretion and judgment by regional directors.

III. The Request for Review Must Be Denied Because the Regional Director's Decision Does Not Raise a "Substantial Question of Law or Policy" Based on a "Departure" from Board Precedent And Does Not Include Any "Clearly Erroneous" Decision on a "Substantial Factual Issue."

In concluding that the IOs are independent contractors, the Regional Director exhaustively analyzed the factual record and considered each of the *FedEx* factors. The RFR "challenges" the Regional Director's conclusions on "*FedEx* Factors #s 1, 2, 3, 5, 7, and 11" and the Regional Director's ultimate conclusion that BFBD has established that the IOs are independent contractors.[4] The Union has not demonstrated any of the limited grounds for granting review under the stringent standard in Section 102.67(c). Its arguments can be summed up as a disagreement with how the Regional Director balanced certain facts, which reflects no "departure" from Board precedent or "clearly erroneous" factual determinations. To the contrary, the Regional Director's decision is fully supported by Board precedent and well-grounded in the record.

A. Control of Work Details (Factor #1)

1. No Departure from Board Precedent

The Union's initial argument is that the Regional Director "departed" from Board precedent by not applying a decision that has no bearing on an independent contractor analysis, *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). The Union

[4] Although the Company is not seeking formal review of the Regional Director's findings that factors 4 (skill required in the occupation), 6 (length of time for which individuals are engaged), 8 (whether or not the work is part of the regular business of the employer), or 10 (whether the principal is or is not in the business) favor employee status, the Company believes the Regional Director erred in analyzing these factors, and that all of these factors also support independent contractor status. Should review be granted, the Company reserves the right to challenge the Regional Director's determinations on these factors, and to address its supervisory and due process arguments, which the Regional Director did not address given his finding of independent contractor status.

appears to suggest that *Browning-Ferris* requires the factfinder to *ignore* evidence of actual control (or lack thereof) and day-to-day practices and instead to solely consider the "potential" right to control under the parties' contractual agreements. RFR at 2-6. However, the Union's reading and application of *Browning-Ferris* is patently incorrect. Moreover, it does not show the Regional Director "departed" from Board precedent for at least three reasons.

First, *Browning-Ferris* is a "joint employer" decision, not an "independent contractor" decision. The Board majority explicitly stated that its decision "does not modify any other legal doctrine or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." 362 NLRB No. 186, slip op. 20, n.120. In fact, the Board majority expressly disclaimed the decision's application to the independent contractor context, and reaffirmed that *FedEx* controls. *Id.* at slip op. 14, n.72 (distinguishing *FedEx* test from joint employer test, in response to dissent's statement that "the Board has assigned probative weight only to evidence of actual authority or control in its assessment of various statutory exclusions, including independent contractors and supervisors"). *Browning-Ferris* did not revise the *FedEx* test in any way, and the Union's argument therefore should be given no weight at all.[5]

Second, nothing in *Browning-Ferris* or *FedEx* suggests that evidence of actual control or practices is irrelevant under Factor #1. To the contrary, *Browning-Ferris* merely clarified in the joint employer context that evidence of potential control, in contrast to only actual control, is relevant as part of the overall analysis. That is what the Regional Director did in this case; he expressly considered both actual and potential control. Decision at 4, n.13, 13.

[5] The one independent contractor case decided by the Board since *Browning Ferris* properly does not cite or rely on *Browning-Ferris* in any way. *Sisters' Camelot*, 363 NLRB No. 13 (Sept. 25, 2015).

Third, the Union overstates the types of control, whether potential or actual, that are probative of employee status under Board precedent. For control to constitute evidence of employee status, it must extend to the "essential details of the . . . day-to-day work," *FedEx*, 361 NLRB No. 55, slip op. 12, rather than simply the outcome or results that must be achieved under the contract. *See Porter Drywall*, 362 NLRB No. 6, slip op. 3 (contract terms do not evidence day-to-day "control" unless *the manner* in which the counterparty meets such obligations is controlled); *see also Browning-Ferris*, 362 NLRB No. 186, slip op. 16 ("We do not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status."); *id.* at 12 (observing that "service under an agreement to accomplish results or to use care and skill in accomplishing results" is not evidence of employment); *Gold Medal Baking*, 199 NLRB at 896 ("[W]e do not believe that the provisions of the distributor agreements, detailed above, impose the types of restrictions on the distributors which, without more, would require a finding that the Employer has reserved to itself control over the means by which the distributors sell and deliver its bakery products.").[6]

Although the Union argues that certain provisions in the parties' Distribution Agreements reflect potential control, RFR at 8-12, none of these terms dictate ***how*** an IO must perform the essential details of operating an independent business. To the contrary, the contract terms merely

[6] In *Browning-Ferris*, the putative joint employer had the ability to control "the processes that shape the day-to-day work of the petitioned-for employees" and make "the core staffing and operational decisions that define all employees' work days," including "unilateral control over the speed of the [work] streams and specific productivity standards,"; "assign[ing] the specific tasks that need to be completed, specify[ing] where [the] workers are to be positioned, and exercis[ing] near-constant oversight of employees' work performance"; "specif[ying] the number of workers that it requires, dictat[ing] the timing of employees' shifts, and determin[ing] when overtime is necessary." 362 NLRB No. 186, slip op. 18-19. Much of that flowed from the operative contractual agreement between the parties. As further discussed below, in contrast to *Browning Ferris*, BFBD has no control, real or potential, over any such day-to-day work details for the IOs.

identify the ***results*** that the IOs are expected to achieve – generally to "develop and maximize" sales – and state that "[a]s an independent contractor, DISTRIBUTOR has the right to operate its business using DISTRIBUTOR'S own judgment and discretion to determine the methods to be used to achieve the results required by this Agreement." *See* BFB Ex. 2, 5, & 6 at § 2.2.[7] In particular, BFBD has no contractual right to control the following "details" for contractual performance, details over which the IOs have complete discretion:

- The amount of product to order, Decision at 12;
- How often to order product, *id.* 12, 21;
- The hours and days they to sell and deliver product and service to IOs' customers, *id.* at 22;
- The manner in which to serve IOs' customers, including the sequence of customer "stops," *id.* at 14;
- Whether to perform services personally, or hire an employee or contractor to provide services, *id.* at 12, 14;
- How IOs solicit cash accounts, *id.* at 17-18, 22;
- Whether IOs solicit new customers, *id.* at 12, 22;
- The sales numbers or performance measures IOs set for their businesses, *id.* at 12, 14;
- Whether to discontinue selling to an unprofitable cash customer, *id.* at 12;
- Whether to negotiate over pricing, promotions, shelf space, and merchandizing with IOs' customers, *id.* at 13, 15, 17-18, 20;
- When and to whom to sell distributorships, in whole or in part, and other business assets, *id.* at 17, 20-21;
- How IOs maintain an adequate and fresh supply of product at the customers' stores, *id.* at 12;
- How an IOs choose to advertise their services and promotion programs, *id.* at 13-14;
- The manner in which an IO maintains sufficient business records and complies with laws and regulations, *id.* at 8, 16; Tr. at 568-571;

[7] References to the Hearing Transcript will appear as "Tr. at __." References to the Joint Exhibits will appear as "J. Ex.__." References to the Company's exhibits will appear as "BFBD Ex.__." References to the Union's exhibits will appear as "P. Ex.__."

- How an IO maintains adequate equipment, Decision at 16-17;
- How an IO principal maintains his or her appearance and that of the IO's employees and contractors, *id.* at 14.

None of the other facts relied on by the Union show "potential" control over details of IO work performance. RFR at 4-5. The Union relies solely on both the "buy-back" provision contained in post-2014 Distribution Agreements as well as the power of attorney provision. *Id.* Neither of these provisions in the Distribution Agreements show any control over IOs, as the Regional Director aptly concluded. All the buy-back provision does is give BFBD a limited right to buy an IO's distributorship, under certain circumstances, for fair market value (which is determined by an arbitrator absent agreement by the parties). Likewise, the power of attorney provision simply permits BFBD to transfer distribution rights in the event that the IO abandons the distributorship or is otherwise incapacitated, and even then the IO would still receive the proceeds of the sale. Without this provision, customers who rely on BFBD products would have no ability to continue purchasing products in the case of an abandoned distributorship. The Regional Director considered and rejected the Union's arguments regarding BFBD's ability to unilaterally transfer Distribution Rights and, for some IOs, buy-back distribution rights because, among other reasons, the "record does not show any instance in which these rights were exercised." Decision at 13. And even if *Browning-Ferris* is applicable (which it is not), the lack of control (potential or actual) clearly outweighs any remote reserved control the Union claims exists here.

In sum, the Regional Director did not "depart" from Board precedent in analyzing Factor #1.

2. No Clear Error on Substantial Factual Issue

Beyond the argument that the Regional Director "departed" from Board precedent, it is difficult to discern from the RFR what "clear error" the Regional Director allegedly made based on the factual record. The Regional Director cited and summarized nearly every fact the Union alleged as evidence of potential control, and rejected each of those arguments. Decision at 12-13. The Regional Director considered that BFBD has the "unrestricted right to unilaterally transfer the distribution rights without cause and the unrestricted right to buy-back a distributor's distribution rights under the terms of the most recent agreements," but concluded that the record did "not show *any instance* in which th[o]se rights were exercised." Decision at 13 (emphasis added). The Regional Director further considered that while BFBD controls products a distributor may sell because its affiliate is the manufacturer of the products, has the alleged right to remove a store from a distributor's sale area[8], and for chain accounts generally controls the price of the products (including promotional prices, margins, and spreads), "this control exerted by [BFBD] is minimized by the fact that the distributors negotiate over these terms at a local level of chain stores and the fact that [BFBD] exerts none of this control with regard to cash accounts." Decision at 13.

The Regional Director similarly weighed that BFBD has some control over whether IOs will receive credit for returned product, as well as the purchase and sale of distribution rights in that it allegedly provides a market value of the route and refers an affiliated lender to finance the transaction, but in both instances, the ultimate decision (whether to return product or to agree on a particular price with a particular financier) is up to the IO. Decision at 14.[9] Finally,

[8] Although the Regional Director made this finding, there is no support in the record for this proposition.

[9] BFBD's Return/Stale Policy the Union cites is not a contractual mandate; the IOs have the option to follow (or not follow) the Policy in order take advantage of the opportunity. *See* BFBD Ex. 2.

the Union's claims that a few postings in the Wilmington depot (where IOs purchase and pick up product) somehow control day-to-day performance was rejected by the Regional Director, albeit when considering Factor #3. *See* Decision at 15 (analyzing Factor #3 and stating, "[t]he depot postings appear to be nothing more than an attempt to 'ensure the safe and efficient operation' of the depot, and they do not dictate how distributors are 'to perform [their] duties.'" (citing *Ariz. Republic*, 349 NLRB 1040, 1043 (2007)).

The fact that the Regional Director did not give these terms as much weight as the Union wanted, or otherwise considered the lack of evidence on actual or day-to-day control over work details, is not "clear error." Although the Union identifies evidence in the record that it believes supports the "right to control" element, RFR at 8-13, the Regional Director properly relied on several critical components of the IOs' business for which BFBD has no right to control:

- How much product to order;
- How often IOs order product;
- How much product to sell and deliver to IOs' customers;
- Whether to change orders in the PROMPT system and/or use bulk ordering;
- IOs' schedules;
- The amount of product IOs sell/deliver or the stops they make;
- Training, orientation, ride-alongs, or any manuals to which IOs adhere;
- Whether and how to hire "a helper to perform some of all of the work on a temporary or part-time basis" and how any of those helpers hired by the IOs should be compensated;
- Performance through "sales quotas, formal audits, or other performance measures;"
- Whether and how to solicit new customers;
- Whether to discontinue selling to an unprofitable cash customer;
- How an IO principal will maintain his or her or an employee's appearance, including whether to affiliate with BFBD through an advertising agreement;

- Whether to negotiate with cash customers, or at a local level with charge customers, over promotional items and shelf spacing; and
- Whether and at what price to sell and purchase distribution rights.

Decision at 12-13.[10] As the Regional Director observed, these facts stand in marked contrast to those in *FedEx*, where FedEx "exercised 'pervasive control' over the essential details of drivers' day-to-day work . . ." *Id.* at 12 (citing 361 NLRB No. 55, slip op. 12-13). FedEx required drivers to be available to perform deliveries at certain hours and days of the week. FedEx also controlled driver delivery or service areas, including the number of packages for delivery and the necessary stops to be made, along with delivery "cut off" times for later in the day, such as 8pm. FedEx assisted its drivers with FedEx-employed pools of replacement drivers to cover for open routes, vacations, and sick days. None of these indicia of "fundamental control over. . . job performance," actual or potential, are present here. *FedEx*, 361 NLRB No. 55, at slip op. 13.

BFBD has *minimal* potential to exercise control and where those opportunities exist, it is not exercised. Those few instances of potential unexercised control cannot and do not outweigh the exceeding number of facts demonstrating a complete lack of control. Even taking the Union's arguments at face value and accepting the scattered facts to which they

[10] *See, e.g.,* Tr. at 269:8-17 (Auer); 620:2-21 (Union witness Campano) (IOs determine how much product to offer, how often to order, and how much to sell/deliver to any given customer); Tr. at 61:4-9 (Mastropietro); 266:8-273:22 (Auer); 454:1-3 (DeLeon); 620:2-21 (Campano); Tr. 369:8-17 (Auer); (Tr. 269:8-17, (Auer)); (Tr. at 267:13-21; 270-273:22 (Auer)); Tr. 619:19-620:5 (Campano) (IOs have control over PROMPT and change their orders, including ordering in bulk and rejecting PROMPT recommendations); Tr. at 51:18-20 (Mastropietro) (IOs have no set hours or days they must sell or deliver and have discretion as to number of stops); Tr. at 49:22-50 (Mastropietro); Tr. at 185:21-186:8; 188:3-9; 188:10-189:3; 190:6-191:7; 234:15-240:21; 238:11-239:11; 248:3-22; 388:22-389:9 (Auer) 610:6-17; 611:15-25 (Campano) (IOs hire employees or helpers with no control from BFBD); Tr. 37:17-22 (Mastropietro); Tr. 130:1-4 (Campano) (IOs have no supervisor, training or orientation required); Tr. at 38:20-21;58:11-13 (Mastropietro); 592:25; 594:7 (Campano); Tr. at 592:25; 594:7 (Campano) (IOs are not subject to any manuals or best practices guidelines or personnel policies or rules); Tr. at 44:24-45:2; 47:2-3 (Mastropietro) (IOs are not subject to any uniform or branding requirements); Tr. at 58:6-10 (Mastropietro); 300:24-301:6 (Auer); 612:24-613:4 (Campano) (do not have to meet any sales quotas).

point in order to argue that control exists, the Regional Director weighed all of those facts of unexercised control in his analysis and found that those minimal facts did not tip the scales. The Regional Director ultimately concluded – correctly – that IOs "have complete discretion to operate their businesses using their own judgment and discretion to determine the methods to achieve those results." In sum, the Regional Director properly exercised his discretion with Factor #1 and balanced the record evidence without any "clear error."

B. Distinct Occupation or Business (Factor #2)

1. No Departure from Board Precedent

Without citing to any relevant Board precedent, the Union complains that the Regional Director departed from established Board precedent by holding that the IOs have a distinct operation or business from BFBD. RFR at 13-15. Yet as recognized by the Regional Director, the relevant facts and circumstances of *FedEx* are fundamentally different than those at issue here. Decision at 13. In *FedEx*, the Board ruled that "[b]y virtue of their [FedEx] uniforms and logos and colors on their vehicles, [FedEx] drivers are, in effect, doing business in the name of FedEx rather than their own." *FedEx,* 361 NLRB No. 55, slip op. 13. *FedEx* observed that these facts distinguished that case from an earlier decision involving drivers, *Argix Direct,* 343 NLRB at 1020-21, "where trucks could be any make, model, or color, and drivers could place their own corporate names or logos on trucks." *Id.* at slip op. 13, n.46.

As set forth below, the record evidence here under Factor #2 bears no resemblance to the evidence presented in *FedEx.* As the Regional Director recognized, IOs do not (and cannot) do business in the name of BFBD; they are prohibited from identifying themselves with BFBD or its products – either on their vehicle or clothing – absent choosing to sign an optional written Advertising Agreement for which they are paid a weekly advertising fee. Decision at 15. But even then, the IOs must still indicate they are independent contractors.[11] As the Regional Director noted, and contrary to the Union's arguments, "the advertising agreement *actually shows* they are distinct businesses." Decision at 14 (emphasis added).

Moreover, the Union recognizes that the Regional Director found IOs (a) "have a right to engage in other businesses" (and some do, contrary to the Union's claim), and (b) "take ownership of the product when it leaves the warehouse and also indemnify [BFBD] against any damage claims," both of which are indicative of independent contractor status. RFR at 14; Decision at 13. In so finding, the Regional Director relied on both *Porter Drywall*, 362 NLRB No. 6, slip op. at 3 (2015) (finding crew leaders engaged in a distinct occupation or business because they did not work exclusively for the Employer, use their own equipment, and were required "to indemnify [the Employer] against any damage claims that may arise as a result of the work of their crews."); and *Dial-A-Mattress Operations Corp.*, 326 NLRB 884, 891 (1998) (finding independent contractor status where owner-operators could use vehicles for other purposes including making deliveries for other companies and were required to "indemnify Dial for various losses, injuries, or damages that may arise in connection with their performance of Dial deliveries.").

The Union fails to cite any Board precedent holding that, in a similar context, the "distinct occupation or business" factor must support the Union. Clearly, the Regional Director did not "depart" from Board precedent in analyzing Factor #2.

[11] The Union also appears to argue that the restrictions placed on IOs' use of "Bimbo's trademark, trade names, and graphical designations" are limited, but to the contrary, the Distribution Agreement prohibits IOs from using any Company-related trademarks in their business name (BFBD Ex. 2 at §12.1), and it requires all lOs to identify themselves as independent contractors. Id. at §2.3.1.

2. No Clear Error on Substantial Factual Issue

The Union also claims that the evidence the Regional Director considered in finding that IOs were engaged in a distinct occupation or business did not "outweigh the factors" that allegedly "support an employee status." RFR at 14. This is not a proper basis for the Board to grant a request for review. Instead, it is merely a request that the Board find differently than the Regional Director.

In any event, the Regional Director's weighing of the evidence under the "distinct business" factor was fully supported by the record, especially when compared to the facts in *FedEx.* Far from "merely not[ing]" the facts that support that IOs are engaged in a distinct occupation or business (RFR at 14), the Regional Director grounded his decision in extensive factual findings and separately weighed the facts that the Union points to in arguing that IOs do not engage in a distinct occupation or business.[12] Specifically, the Regional Director found the following facts favored an independent contractor finding:

- IOs "do not do business in the name of Bimbo Foods;"
- IOs "are not required to wear uniforms or badges;"
- IOs "are not required to place logos on their trucks;"
- "The distribution agreements actually prohibit the distributors from using Bimbo-related trademarks as part of their business name;"
- The distribution agreements "require all [IOs] to identify as independent contractors;"
- "About half of the distributors have incorporated or formed LLCs;"
- The IOs have the "right to engage in other businesses, including selling other products, so long as they are not competitive with Bimbo Foods' branded products;"

[12] Specifically, the Regional Director weighed the Union's arguments regarding IOs' purported dependency on BFBD's infrastructure and relationships with chain stores and found that those facts did not tip the balance in favor of an employee finding: "The distributors are dependent on the infrastructure of Bimbo Foods, and affiliated entities, such as the depot, web-based ordering system, and Bimbo Food's relationship with the chain stores at the regional and national level. This level of dependency is insufficient, in my view, to conclude that they are not engaged in a distinct business." Decision at 14.

- The IOs "take ownership of the product when it leaves the warehouse;"
- The IOs "indemnify Bimbo Foods against any damage claims;" and
- BFBD "offers distributors the opportunity to enter into advertising agreements" in which IOs are paid to wear Bimbo-branded clothing and/or use logos on their trucks, but the "advertising agreement specifically requires the distributor to indicate on the vehicle or shirt that it is an independent operator," which "actually shows they are distinct businesses."

Decision at 13-14. The Union doesn't even try to assert that these facts are wrong; it simply claims the Regional Director was wrong for finding that the facts support independent contractor status. That is not a proper basis for review.

C. Whether the Work is Usually Done Under the Direction of the Employer or a Specialist Without Supervision (Factor #3)

1. No Departure from Board Precedent

The Regional Director did not depart from, and correctly applied, extant Board precedent in analyzing Factor #3. In *FedEx*, the Board held that this factor weighed in favor of employee status because FedEx "essentially directs [its drivers'] performance via enforcement of rules and tracking mechanisms." *FedEx*, 361 NLRB 555, slip op. at 13. However, in examining the Board decision in *FedEx* in comparison to the IOs here, the Regional Director drew several significant distinctions between the IOs at BFBD and the FedEx drivers, noting that in *FedEx*: (1) drivers were "required to adhere to a strict company protocol, with guidelines governing dress, appearance, safety, and details of package delivery; (2) FedEx conducted "periodic audits and appraisals of driver performance;" (3) FedEx had the ability to track all major activities, such as sign in and out times and delivery times with a scanner; and (4) FedEx imposed disciplinary measures such as suspension and termination. Decision at 14 (citing *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13). None of those facts exist here.

In concluding that Factor #3 weighed in favor of independent contractor status, the Regional Director relied on a number of record facts to support his conclusion:

- There is "no supervisory or disciplinary system for distributors and Bimbo Foods does not closely supervise the distributors:"
- IOs "[d]o not have supervisors:"
- IOs "are not required to attend trainings or meet with anyone from Bimbo Foods…;"
- "There are no route rides or formal audits conducted by Bimbo Foods;"
- "There are no mandatory trainings, sales quotas, or requirements for sales reports:"
- "The distributors set their own hours and have no attendance requirements;"
- "The fact that the [Wilmington] depot is open specific hours and days of the week does not alter the fact that the distributors still have the right to set their own hours at the depot within the hours that it is open;"
- "The distributors determine how to execute their routes and the order of their deliveries:"
- "[T]here are absentee owners who are clearly not supervised by Bimbo Foods because they are not involved in the daily operations of their distributorships; and
- BFBD has "no involvement in the distributors' use of helpers to assist with their operations and the helpers do not work under the direction" of BFBD. BFBD "does not hire the helpers or have any right to discipline or terminate the helpers".

Decision at 14.

Notwithstanding the fundamental differences between this case and *FedEx* under Factor #3, the Union incorrectly asserts that the Regional Director departed from Board precedent because BFBD allegedly (a) supervises IOs by acting "in concert with" customers to manage customer expectations, (b) determines how products are displayed, product supply, and merchandizing; (c) conducts periodic store visits; and (d) issues breach letters for failing to comply with such expectations.[13] RFR at 15-16. However, the Board precedent explicitly

[13] There is no support in the record for the Union's claims that BFBD (a) supervises IOs by acting "in concert with customers" or (b) determines products display, product supply, and merchandizing. To the contrary, the record clearly demonstrates that IOs directly manage and develop relationships with customers by directly negotiating pricing, shelf space, and merchandizing standards. Tr. at 65:25-66:7; 66:16-22; 123:7-12; 71:5-14; (Mastropietro); 253:10-24; 253:19-23; 254:4-13; 257:2-5; 279:5-13 (Auer); BFBD Exs. 7-14 at § 5.2

recognizes that quality control review of products is not tantamount to direction or supervision and does not undercut independent contractor status, but instead serves as a means to enforce contractual rights typical of almost any commercial agreement. *See Porter Drywall*, 362 NLRB No. 6, slip op. at 4; *see also* Decision at 15. In fact, the Regional Director recognized that store visits and breach letters "indicate[] a limited amount of direction by Bimbo Foods in the operations of distributors," but flatly rejected the Union's arguments that this "level of involvement" warranted a finding of employee status. *See* Decision at 15 ("[Issuing breach letters] amounts to advising a distributor of a violation of agreement to allow the distributor the opportunity to correct the mistake. This level of involvement is insufficient, in my view, to find employee status.") (*citing Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (finding independent contractor status notwithstanding employer's ability to review quality control and demand corrections from contractors), and *Ariz. Republic*, 349 NLRB at 1043 (finding independent contractor status despite employer communicating customer complaints to independent contractor)).

The Union also mistakenly argues that the Regional Director departed from Board precedent because IOs are allegedly subject to the depot postings at the Wilmington depot, provisions of the Distribution Agreement that prohibit violence or alcohol and drug use, and are "subject to discipline" for violating such policies. Yet the Union cites no Board authority that the Regional Director allegedly failed to follow. To the contrary, the Regional Director noted the Board has described such policies as "simply ensur[ing] the safe and efficient operation of the distribution center" and "they do not dictate *how* the [independent contractor] is to perform his or her duties." Decision at 15 (*citing Ariz. Republic*, 349 NLRB at 1043 (emphasis added)). As explained in further detail in Part III.A-B *infra*, IOs are not subject to any formal discipline system or personnel policies, which further supports an independent contractor finding under Board law. *Id.* (supervision factor weighed against independent contractor status where no progressive discipline system found).[14]

Finally, the Union erroneously argues that the Regional Director departed from *FedEx* and *Browning-Ferris* because he considered whether BFBD *actually* imposed discipline rather than BFBD's *theoretical* authority to impose consequences for breaches of the distribution agreement (RFR at 17). As discussed at length above, *Browning-Ferris* is inapplicable here, and independent contractor Board precedent clearly recognizes a contractor's right to ensure performance under the parties' contract. *See Porter Drywall* and *Ariz. Republic, supra.* Indeed, the Board in *FedEx* plainly distinguished between the theoretical and the actual experiences of workers, explaining that its "focus on actual opportunity demands that [it] assess the specific work experience of those individuals in the petitioned-for unit." 361 NLRB No. 55, slip op. at 1, 16. Moreover, the Board expressly relied upon FedEx's "*enforcement* of rules and tracking mechanisms." *Id.* at 13 (emphasis added). Given that this factor requires the factfinder to make a determination whether or not direction or supervision is "usual," it is essential to examine how the parties' relationship operates in practice. *Browning- Ferris*, which simply did not address this issue directly or indirectly, does not change the outcome. In sum, the Regional Director did not "depart" from Board precedent in analyzing Factor #3.

[14] Additionally, the Union's argument that IOs wear only certain "approved clothing" under the clothing advertisement agreement supports a finding of employee status (RFR at 16) is disingenuous. The advertising agreement does not *require* IOs to wear BFBD clothing while performing services pursuant to the distribution agreements – IOs *choose* to enter into advertising agreements and receive advertising payments form BFBD for contractual performance. This, again, is markedly different than the drivers in *FedEx* who were "required to adhere to strict protocol regarding dress, appearance and safety." Decision at 14 (*citing FedEx*, 361 NLRB No. 55, slip op. at 13).

2. No Clear Error on Substantial Factual Issue

The Union argues the Regional Director made a clearly erroneous decision on substantial factual issues pertaining to lack of supervision and direction by BFBD, but it does not even point to any specific fact that is "clearly erroneous." Instead, the Union re-hashes the arguments made in its post-hearing brief, and essentially argues that the Regional Director just did not weigh the facts in the correct way. Again, this is not a valid basis for review.

The Union is wrong anyway. The Regional Director's weighing of the evidence under the "without supervision" factor was fully supported by the record. The RFR argues the "without supervision" factor is indicative of employee status because IOs come to the depot on certain days during certain time windows, because BFBD representatives visit stores IOs sell to, because IOs wear Bimbo-branded clothing,[15] and because IOs are subject to being "breached" if they engage in violence or threats of violence. RFR at 15-16. These are the same arguments the Union made in its post-hearing brief, and they were obviously considered and rejected by the Regional Director. *See* Decision at 14, "[t]he fact that the depot is open specific hours and days of the week does not alter the fact that distributors still have the right to set their own schedule at the depot within the hours that it is open"). The Union completely fails to account for the rest of the Regional Director's findings – that IOs do not have supervisors, do not attend trainings, do not have ride-alongs, sales quotas, or requirements for sales reports, that IOs set their own hours and do not have attendance requirements or paid leave, and that some IOs are "absentee" or use employees and thus may never even interact with BFBD. Thus, the Union is not even arguing that the Regional Director made any "clearly erroneous" factual finding. Indeed, it is not even

[15] The Union conveniently ignores the fact that the advertising agreement is *completely voluntary* and IOs are free to reject the agreement or opt-out after entering into it. Absent an agreement to advertise BFBD or its products, IOs are not required to wear any kind of clothing or affix advertisements or decals to their vehicles. Indeed, the lone IO who testified even admitted that he "could wear whatever [he] want[s]" unless he signed an agreement with BFBD to advertise.

alleging that any of the Regional Director's factual findings are erroneous; instead, the Union is arguing that the Regional Director's application of the facts is wrong, and that the Regional Director should have put more weight on the facts that the Union believes are indicative of employee status. This is simply not a valid basis for review.

D. Whether BFBD or the individual supplies the tools and instrumentalities for the work (Factor #5)

1. No Departure from Board Precedent

The Regional Director found that Factor #5 was "neutral" but "lean[ed] more in favor of independent contractor status." Decision at 16. Once again, the Union claims that the Regional Director departed from precedent, but it continues to cite no such Board precedent whatsoever. The Regional Director relied on extensive Board precedent to conclude that that this factor favored independent contractor status. *See* Decision at 16 (*citing Porter Drywall*, 362 NLRB No. 6, slip op. at 4, *Argix Direct*, 343 NLRB at 102, and *Ariz. Republic*, 349 NLRB at 1044). In *Arizona Republic*, the Board found this factor favored independent contractor status, emphasizing the facts that contractors were responsible for "their own tools, supplies and transportation, and insuring that their equipment is in working orders." 349 NLRB at 1044. Likewise, in *Argix Direct*, the Board found independent contractor status where the drivers bore the sole responsibility for "the most costly piece of equipment used in making deliveries for the Employer—the truck." 343 NLRB at 1021 (emphasizing that Argix "does not own or lease any of the owner-operators' trucks," "does not provide any financial assistance . . . to help them acquire trucks," "[t]rucks can be of any make, model, or color, and the owner-operators frequently place their corporate or individual names and logos on the trucks . . ." and operators were "responsible for their trucks' maintenance, repairs, and insurance."). Similarly, the Regional Director emphasized here that although BFBD "provides some necessary infrastructure to the [IOs] . . . these are somewhat minimal to the cost of the trucks." Decision at 16. Thus, the Regional Director did not depart from Board precedent in analyzing Factor #5.

2. No Clear Error on Substantial Factual Issue

The Regional Director made no clear factual error in analyzing *FedEx* Factor #5. The Union barely tries on this factor. The entirety of their argument is "while the Distributors provide their own trucks, fuel, insurances and the handheld computers, Bimbo provides the Depot, all the products to be sold, the ordering software system, the trays and dollies and the administration supplies used by Distributors. In addition, a Distributor's daily loads are assembled by Bimbo, hourly, warehouse employees." RFR at 18. This is exactly what a Request for Review is <u>not</u> for – re-arguing the same theories that were previously argued and expressly rejected. The Union identifies no fact that the Regional Director got "wrong," and again ignores any facts that do not fit its narrative.

For example, the Union does not argue that the Regional Director was wrong to find that "distributors provide their own vehicles and are responsible for all related costs," or that "Bimbo Foods does not impose any requirement on the type of vehicle that is used," or that "[t]he distributors provide their own business cards, cell phones, phone numbers, and email addresses, and business insurance." Decision at 16. Nor could they. Instead, again the Union seems to just be saying the Regional Director did not place the proper emphasis on the "facts" that it considers indicative of employee status. For these reasons, there is no clear error here.

E. Method of Payment (*FedEx* Factor #7)

1. No Departure from Board Precedent

As with the rest of its analysis, the Union cites no Board precedent from which the Regional Director allegedly departs. The Regional Director's Decision carefully weighed extant Board law and correctly concluded that IOs are independent contractors under Factor #7.

In concluding that IOs are independent contractors, the Regional Director relied on *FedEx*, where the Board ruled that "FedEx's system of compensation . . . greatly minimizes the possibility of genuine financial risk or gain" and emphasized the inability of FedEx drivers "to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits," *id.*, in stark contrast to the IOs here. Decision at 17-18. Additionally, the Regional Director relied on *Argix Direct*, where the Board found that the method of payment factor favors independent contractor status where individuals receive "no minimum guaranteed compensation." 343 NLRB at 1022; *see also Dial-A-Mattress*, 326 NLRB at 892 (finding factor to weigh in favor of independent contractor status where the income between individuals depended on negotiating reduced rates, the employer did not provide minimum compensation or other fringe benefits, and provided employees with a IRS-1099 tax form). As explained in greater detail below, the facts in the record support the application of this Board precedent here.

The Union fails to cite any Board precedent holding that the facts on which the Regional Director relied support a finding of employee status. As such, the Regional Director has not "departed" from any Board precedent in analyzing Factor #7.

2. No Clear Error on Substantial Factual Issue

Continuing its pattern, the Union cites no fact that the Regional Director got wrong, instead rehashing the arguments the Regional Director already rejected. Again, this is not a valid basis for review. It is not enough to say "the Regional Director's analysis is wrong" – the Union must show that the Regional Director was clearly wrong about facts that colored his analysis. That it has utterly failed to do.

In analyzing Factor #7, the Regional Director weighed evidence that arguably supported a finding of employee status, including much of the same evidence cited by the Union in its post-hearing brief and in its RFR, but he properly balanced that evidence against the stronger indicia that supported independent contractor status. Decision at 17-18.

The Regional Director noted the following facts that were distinguishable from FedEx and thus plainly supported contractor status:

- BFBD does not "minimize the risk of loss by reimbursing distributors for a decrease in sales or a reduction of customers on their routes;"
- BFBD does not "guarantee a daily payment;"
- BFBD does not "subsidize distributors on certain routes;"
- BFBD does not "provide a mileage subsidy if gasoline prices increase;"
- BFBD does not "minimize the possibility of economic gain by reconfiguring service areas in response to customer demand;"
- "There is substantial variability in the distributor's weekly and annual compensation that is attributable to other factors, including their exercise of entrepreneurial opportunity, along with changes in the market resulting from the opening and closing of retail stores;"
- IOs are able to "maximize profits by hiring helpers, increasing their sales, soliciting other accounts, participating in the advertisement agreement;" and
- IOs are "negotiating with cash account customers and local chain customers with regard to pricing, promotions, displays and shelf space."

Decision at 17-18. This evidence overwhelmingly supports the Regional Director's finding that IOs are independent contractors.

The Union also mistakenly claims that the Regional Director ignored the fact that BFBD "assumes all risk of nonpayment by [the customer]" because IOs allegedly receive full credit for invoices, charge slips, and scan reports so long as the customer has been pre-approved by BFBD. RFR at 20. This is untrue for two reasons. First, and as explained in more detail in addressing Factor #11 below, BFBD does not shield IOs from risk. The Regional Director explained, and the evidence supports, that IOs are not free of risk because, an IO must *choose to return* the product to the depot and conform to certain quality and timeliness standards for the IO to receive credit. Decision at 20. Second, the Union compounds its error by asserting that the Regional

Director never mentioned invoices or customer payment in his Decision. RFR at 20. In fact, the Regional Director mentioned and considered that IOs generate an order invoice for each customer and then sell their accounts receivable for certain customers to BFBD. Decision at 6.

Accordingly, the Regional Director properly exercised his discretion and weighed the evidence without "clear error" in analyzing Factor #7.

F. Whether IOs Are Rendering Services as Part of an Independent Business (*FedEx* Factor #11)

1. No Departure from Board Precedent

The Union again mistakenly argues that the Regional Director departed from existing Board precedent, namely *FedEx* and *Browning-Ferris*. Under *FedEx*, the independent business factor, Factor #11, examines whether there is (1) significant entrepreneurial opportunity for risk or loss, (2) a realistic ability to work for other companies, (3) proprietary or ownership interest in the work, and (4) control over important business decisions such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital. *FedEx Home Delivery,* 361 NLRB No. 55, slip op at 12. The RFR simply recites *Browning-Ferris* and *FedEx* without explaining ***how*** the Regional Director's decision deviated from Board precedent.

To the contrary, the Decision is a well-reasoned examination of *FedEx* Factor #11 and each of its sub-components. The Regional Director identified numerous facts demonstrating the significant entrepreneurial opportunity enjoyed by the IOs, including the right of IOs to engage in other business endeavors such as delivering other non-BFBD or BBUSA products, the proprietary and ownership interest that IOs take in their business operations, and the significant control IOs have over their respective businesses. *See* Decision at 20-21. In analyzing whether IOs enjoyed entrepreneurial opportunity, the Regional Director dutifully examined – as required by *FedEx* – whether IOs (1) bear the opportunity for actual, and not merely theoretical, risk of loss; (2) have the right to sell their businesses; and (3) are constrained by BFBD in setting the value of their routes. *FedEx*, 361 NLRB No. 55, slip op. at 10, 12.

The Regional Director also distinguished the instant facts from *FedEx* in a number of ways. Unlike *FedEx* where there were only two route sales in the history of the location, the evidence demonstrated that IOs regularly buy and sell portions or all of their distribution rights. Decision at 20. Further, the only way an IO may acquire a new or existing route is to purchase the route from another IO or BFBD; FedEx drivers were not required to purchase or make any other monetary commitment prior to operating a route. Decision at 21.

Accordingly, the Union has failed to show that the Regional Director "departed" from *FedEx* or other precedent. As explained in greater detail below, the Regional Director found that the balance of the evidence weighed in favor of independent contractor status.

2. No Clear Error on Substantial Factual Issue

The Union once again argues its interpretation of the evidence should trump the Regional Director's by improperly assigning weight to other *FedEx* factors that it deems more favorable to employee status while diminishing, or altogether ignoring, evidence supporting independent contractor status. The Union tries to merge multiple *FedEx* factors under the "independent business" factor in order to tip the balance in favor of employee status. RFR at 21-24. This is just more of the same – the Union seeking Board review not based on any "clear error" of fact, but instead based on a desire for the Board to weigh the facts differently than the Regional Director. Once again, this is not proper grounds for review.

The Regional Director found, *inter alia*, that IOs "have significant entrepreneurial opportunity with regard to the operation of their businesses," that "many distributorships increase in value over the years through the efforts of their owners. . . [or] remain steady in value or decrease in value as a result of lack of business efforts or market factors," that IOs "bear all risk of loss," that IOs "have a proprietary interest in their routes that is not limited by Bimbo Foods," that IOs can and do engage in other businesses, that IOs regularly purchase and sell distributorships, and that IOs control many other "important business decisions." Decision at 21-22. And there is substantial record evidence to back up the Regional Director's finding. The Union's only witness testified to being involved in at least three sale/purchase transactions in just the past few years, including buying his current "route" for $106,000 and testifying that he got a "smoking deal" when doing so because he believed he could sell that business for a $100,000 profit after increasing its value through his own hard work. Tr. at 555:13; 637:24-638:2 (Campano). BFBD's witnesses also testified to dozens of purchase/sale transactions with distributorships being bought and sold for between $100,000 and $250,000. Tr. at 29:19-21 (Mastropietro).

The Union challenges none of these facts as wrong, let alone "clearly erroneous." Again, it just claims the Regional Director improperly weighed the facts in finding independent contractor status. What is undisputed is that the Regional Director did weigh the facts (including those which the Union claims favor employee status but in reality, do not) – he addressed that the IOs' risk is reduced by the return policy, he addressed that a BFBD affiliate uses a formula to value distributorships for purposes of financing the purchase of distribution rights, he addressed that many IOs used a Bimbo affiliate for financing, and he addressed that Bimbo has the right to buy back the distributorship under certain conditions. Decision at 13. After addressing all of those issues, he held that this factor supported independent contractor status. *See* Decision at 21-22. That decision was clearly right - the totality of the evidence not only reasonably supports independent business operations under Factor #11 but also amply demonstrates the significant distinctions between the drivers in *FedEx* and IOs. Even if he was wrong (and he was not) – even if the Board weighed the evidence differently – that is not a basis for review. The Union has not even tried to identify any clear factual errors, and that is fatal to its request for review.

IV. Summary of Major Factual Distinctions Between *FedEx* and the Instant Case with Respect to the Five Factors Cited in the Request for Review

Other than *FedEx,* the Union cites no Board independent contractor decision when arguing that the Regional Director "departed" from Board precedent. Thus, it is helpful to show a comparison between the key facts in *FedEx* and in this case, for each of the six *FedEx* factors discussed by the Union. The facts – summarized below in a chart – shows the material differences between the IOs and the *FedEx* drivers and thus reveal the Union's argument as a poorly veiled attempt to replace the Regional Director's findings of fact with its own interpretation of the evidence.

FedEx Facts	**BFBD Facts**
Extent of Control By Employer Over Work Details	
Drivers required to be available for deliveries on specific days of the week; FedEx requires driver availability for certain hours; FedEx controls service area for drivers; FedEx controls number of packages for delivery and stops to be made; FedEx requires package delivery by certain times; FedEx employs pool of replacement drivers to cover for vacations and open routes; FedEx requires ongoing drug tests, physical examinations, and safety inspections.	IOs determine how much product to offer, how often to order, and how much to sell/deliver to any given customer; IOs have no set hours or days; IOs may hire employees or helpers to operate some or all of the business; "absentee owners" do not to do any work at all, choosing to hire others to operate their distributorships full-time; IOs have no supervisor, and they are not required to undergo any training; IOs have complete discretion regarding whether and how to solicit new customers in their respective sales areas, and may choose to do so or not do so; IOs are not required to meet any sales quotas or other performance measures.
Whether the Individual is Engaged in a Distinct Occupation or Business	
FedEx requires identical uniforms, badges, logos, colors, and vehicles, thereby limiting the ability of FedEx drivers to perform business services for others; no evidence of independent	IOs are not required to wear uniforms or place BFBD brand logos on their vehicles, instead electing (only if they wish) to enter into commercial advertising agreements for which

business marketing or sales efforts.	they are paid to display brand logos; IOs identify themselves as independent contractors; 20 of 48 IOs have incorporated or formed LLCs; IOs can and do sell and deliver non-BFBD products as part of their business.
Whether the Work is Usually Done Under the Direction of Employer or Without Supervision	
FedEx drivers required to adhere to strict company protocol on dress, appearance, safety, and package delivery details; FedEx tracks driver location and performance of all major work activities; FedEx requires daily driver logs and vehicle inspection reports and monthly maintenance forms; FedEx provides route manifest and turn-by-instructions and delivery sequence; FedEx has contractual right to conduct "driver audits."	IOs are free and clear from any supervision or disciplinary system; BFBD has no mandatory dress code, safety, or package handling procedures applicable to IOs; BFBD does not require IOs to undergo training or ride-alongs with any BFBD personnel; BFBD does not require driver audits; BFBD does not require IOs to report sales activities or prepare sales reports; BFBD has no method to track IOs and does not require IOs to maintain a log; IOs at their discretion can hire, fire, and pay helpers without BFBD interference or involvement; IOs routinely ignore suggestions from BFBD personnel without consequence or discipline.
Who Supplies the Tools and Instrumentalities of the Work	
FedEx dictates vehicle specifications; FedEx facilitates the transfer of vehicles between drivers; FedEx provides a fuel/mileage subsidy if gasoline prices increase substantially; FedEx provides prospective drivers with names of dealers and operates a vehicle-sales database.	IOs select and purchase their own vehicles and are responsible for all related costs, including maintenance, gas, tolls, vehicle registration, and liability for any speeding tickets; BFBD does not approve an IO's choice of a vehicle or impose any requirement on the type of vehicle used; BFBD does not provide IOs with business cards, cell phones, phone numbers, email addresses, or other equipment; IOs must select and purchase computers and printers on their own.
Method of Payment	
FedEx minimizes possibility of genuine financial risk or gain; FedEx provides daily minimum compensation for drivers; FedEx provides subsidies for emerging routes; FedEx provides compensatory payment if FedEx reduces driver work volume; FedEx provides fuel/mileage subsidy for gas price increases.	IOs are not paid an hourly wage or salary, they are not commissioned, they do not receive any fringe benefits, and are not due any minimum compensation; BFBD does not minimize their risk of financial gain or loss; BFBD does not reconfigure routes based on struggling sales; IOs can invest and purchase distribution rights by buying some or all of the distribution rights for other sales areas; IOs can and do negotiate with customers for increased shelf space,

	product promotions, store displays, and product pricing; IOs regularly solicit additional accounts within a territory to expand sales; IOs are not shielded from external market factors such as store openings and closures.
Whether the Individual is Rendering Services as Part of an Independent Business	
FedEx drivers' ability to sell route is theoretical, not actual, with little to no evidence on profit or loss with limited transfers; contract drivers do not pay to acquire new or existing routes; FedEx can reconfigure or discontinue routes at any time; FedEx can require service outside driver's route; FedEx solely controls business strategy, customer base, and prices for all customers.	IOs regularly buy and sell their distribution rights, or portions of their rights, for substantial amounts – the Union's witness testified to being involved in three sale/purchase transactions in the several years prior to the hearing, including buying his current business for $106,000, which he considered a "smoking deal" because he believed he could sell it for a $100,000 profit within a year; IOs bear the risk of loss for the products they purchase, such as product expired, stolen, or eaten by customer employees; BFBD does not compensate IOs for external market factors that decrease sales; BFBD does not reallocate or redistribute routes; IOs can increase their revenue by soliciting new business, negotiating with customers for more shelf space, and increasing volume; BFBD does not meaningfully limit IOs' right to buy or sell distribution rights and IOs can sell to family; IOs purchase and sell other non-BFBD products from their trucks; IOs bear the sole responsibility to obtain cash or loans when purchasing distribution rights; IOs have complete control over hiring, firing, and paying their own helpers or employees without BFBD's involvement; IOs control their own schedule; IOs select and purchase their own equipment without BFBD assistance; and IOs invest significant capital in their businesses.

CONCLUSION

Based on his careful consideration of the extensive factual record, the Regional Director issued a thorough decision concluding that the 48 IOs in the petitioned-for unit are independent contractors under the common law test. That determination was well within his discretion and existing Board precedent. An alternative finding would have been a substantial departure from established Board law on employee status, including the most recent *FedEx* decision. It also would have unraveled the IO business relationships that have been in place for many years, and potentially jeopardized the special status, expectations, and monetary value of distributorships for IOs and their families.

The Union has failed to provide any "compelling reason" for the Board to grant the Request for Review under the applicable standards. If review were granted here, it effectively would send the signal that all fact-intensive, multi-factor test cases should be subject to Board review, no matter how diligently the Regional Director analyzes an extensive factual record and weighs the relevant facts and factors before him or her. For all of the foregoing reasons, BFBD respectfully requests that the Board deny the Request for Review.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, a true and correct copy of the foregoing Opposition to Request for Review was filed, via the Board's electronic filing system, and served by electronic mail upon the following:

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